Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-423

In the Supreme Court of the United States

OCTOBER TERM, 1982

GARY KOO and
ANTHONY SALVATORE JACENE,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

SUSAN TALBOT
Assistant Attorney General
Chief, Appellate Criminal Division

ROBERT C. SMITH, Jr.
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel for Respondent

October, 1982

QUESTION PRESENTED FOR REVIEW

Is the Oklahoma Commercial Gambling Statute which prohibits "receiving a bet" so broad in its scope or vague in its application as to be unconstitutional under the Fifth or Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	7
REASONS FOR DENYING THE WRIT:	
I. The Court should dismiss the discretionary review sought herein since the decision rendered below does not constitute a "final judgment" of the state criminal proceedings pending against the petitioners	9
II. The Oklahoma Commercial Gambling Statute which prohibits "receiving a bet" is not so broad in its scope or vague in its application as to be unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution nor is it in conflict with applicable decisions of this Court	13
CONCLUSION	18
APPENDIX A:	
Appellees' Petition for Rehearing	A-1

TABLE OF AUTHORITIES

Cases	PAGE(S)
Abney v. *United States*, 431 U.S. 651 (1977)	10, 11
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	16
Cardinale v. *Louisiana*, 394 U.S. 437 (1968)	14
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	9
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	10
Eastman v. *State*, 131 Ohio St. 1, 1 N.E.2d 140, *cert. denied*, 299 U.S. 505 (1936)	9
Griffin v. *Breckinridge*, 403 U.S. 88 (1971)	15
Harris v. *Washington*, 404 U.S. 55 (1971)	9
Jump v. *Goldenhersh*, 619 F.2d 11 (8th Cir. 1980)	15
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939)	14
Mills v. *Alabama*, 384 U.S. 214 (1966)	9, 11
Papchristov v. *Jacksonville*, 405 U.S. 156 (1972)	14
Ruth v. *United States*, 354 U.S. 476 (1957)	15
Stack v. *Boyle*, 342 U.S. 1 (1951)	10
State v. *Koo*, 647 P.2d 889 (Okl.Cr. 1982)	1, 8, 10
Street v. *New York*, 394 U.S. 576 (1969)	14
United States v. *Baranski*, 484 F.2d 556 (7th Cir. 1973)	16
United States v. *Cartano*, 534 F.2d 788 (8th Cir. 1976)	15
United States v. *Chiarizio*, 388 F.Supp. 858 (D. Conn. 1975)	15
United States v. *Dacus*, 634 F.2d 441 (9th Cir. 1980)	17
United States v. *Harris*, 347 U.S. 612 (1954)	14
United States v. *MacDonald*, 435 U.S. 850 (1978)	10, 11
United States v. *Matya*, 541 F.2d 741 (8th Cir. 1976)	16
United States v. *Petrillo*, 332 U.S. 1 (1947)	15
United States v. *Vuitch*, 402 U.S. 62 (1971)	14
Walls v. *State*, 514 P.2d 404 (Okl.Cr. 1973)	12
Younger v. *Harris*, 401 U.S. 37 (1969)	11

AUTHORITIES CONTINUED — PAGE(S)

United States Constitution

Fifth Amendment 2
Fourteenth Amendment 2

Statutes and Codes

18 U.S.C. § 1955 ..... 3, 12
28 U.S.C. § 1257(3) 2, 3, 9
21 O.S. 1971, § 107 (now codified as 21 O.S. 1981, § 107) 4, 14
21 O.S. Supp. 1975, § 981 (now codified as 21 O.S. 1981, § 981) 4, 8, 15
21 O.S. Supp. 1975, § 982 (now codified as 21 O.S. 1981, § 982) 5, 7, 8, 13, 14, 15, 17

Rules

Oklahoma Court of Criminal Appeals, Rule 6, *et seq.* ... 6, 8

No. 82-423

In the
Supreme Court of the United States
OCTOBER TERM, 1982

GARY KOO and
ANTHONY SALVATORE JACENE,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on June 16, 1982, and to which rehearing was denied on July 12, 1982.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported as *State* v. *Koo*, 647 P.2d 889 (Okl.Cr. 1982).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on June 16, 1982. A petition for rehearing was denied on July 12, 1982. The petitioners seek to invoke this Court's discretionary jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 18 U.S.C. § 1955 states in pertinent part:

"*Prohibition of illegal gambling businesses*

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

Title 28 U.S.C. § 1257(3) states:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug-

nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Title 21 O.S. 1971, § 107 (now codified as 21 O.S. 1981, § 107) provides:

"The singular number includes the plural, and the plural the singular."

Title 21 O.S. Supp. 1975, § 981 (now codified as 21 O.S. 1981, § 981) provides in pertinent part:

"Definitions

As used in this act:

1. A 'bet' is a bargain in which the parties agree that, dependent upon chance, or in which one of the parties to the transaction has valid reason to believe that it is dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet does not include:

a. bona fide business transactions which are valid under the law of contracts including, but not limited to, contracts for the purchase or sale at a future date of securities or other commodities and agreements to compensation for loss caused by the happening of the chance including, but not limited to contracts of indemnity or guaranty and life or health and accident insurance; or

b. any bingo game or a game of chance with comparable characteristics by or for participants conducted by an authorized nonprofit organization under the laws of this state pursuant to Title 21, Oklahoma Statutes, Sections 995.1 to 995.18; or

c. offers of purses, prizes or premiums to the actual participants in public and semipublic events, as follows, to wit: Rodeos, animal shows, expositions, fairs, athletic events, tournaments and other shows and contests where the participants qualify for a monetary prize or other recognition. The subparagraph further excepts an entry fee from the definition of a 'bet' as applied to enumerated public and semipublic events.

* * *

4. A 'gambling place' is any place, room, building, vehicle, tent or location which is used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling devices. Evidence that the place has a general reputation as a gambling place or that, at or about the time in question, it was frequently visited by persons known to be commercial gamblers or known as frequenters of gambling places is admissible on the issue of whether it is a gambling place."

Title 21 O.S. Supp. 1975, § 982 (now codified as 21 O.S. 1981, § 982) provides:

"*Commercial gambling*

A. Commercial gambling is:

1. Operating or receiving all or part of the earnings of a gambling place;

2. Receiving, recording or forwarding bets or offers to bet or, with intent to receive, record or forward bets or offers to bet, possessing facilities to do so;

3. For gain, becoming a custodian of anything of value bet or offered to be bet;

4. Conducting a lottery or with intent to conduct a lottery possessing facilities to do so;

5. Setting up for use or collecting the proceeds of any gambling device; or

6. Alone or with others, owning, controlling, managing or financing a gambling business.

B. Any person found guilty of commercial gambling shall be punished by imprisonment for not more than ten (10) years or a fine of not more than Twenty-five Thousand Dollars ($25,000.00), or by both such fine and imprisonment."

The Oklahoma Court of Criminal Appeals, Rule 6, *et seq.*, provides:

"The State of Oklahoma, by and through the district attorney or Attorney General, shall have the right to appeal an adverse ruling or order of a magistrate sustaining a motion to suppress evidence, quashing an information, sustaining a plea to the jurisdiction or a demurrer to the information, or an order discharging a defendant at the preliminary examination because of insufficiency of the evidence to establish either that a crime has been committed or that there is probable cause to believe that the accused has committed a felony. Such an appeal shall be taken in the following manner:

* * *

. . . within five (5) days from the date of the magistrate's adverse decision, the State shall file with the court clerk a written application to appeal from the adverse ruling or order of the magistrate, and a copy of the application shall immediately be presented by the State to the Presiding Judge of the Judicial Administrative District. . . .

* * *

In the event the State's application is sustained and the reviewing judge determines the magistrate's adverse ruling or order to be an error of law, the judge shall remand the cause to the magistrate with directions to enter a proper order.

* * *

In the event the State's application is denied and the district court affirms the magistrate's ruling or order, that ruling or order shall become final; however, the State shall have the right to appeal from that final order to the Court of Criminal Appeals in the manner provided for an appeal by the State; PROVIDED that during the pendency of the appeal by the State, the district judge or associate district judge must admit the defendant to bail on his own recognizance. Because jeopardy has not attached, on appeal the Court of Criminal Appeals may affirm, reverse or modify the magistrate's order and remand the case for further proceedings."

STATEMENT OF THE CASE

Gary Koo and Anthony Salvatore Jacene (hereinafter referred to as the petitioners) were charged by Information (CRF-80-322, CRF-80-325, CRF-80-326, CRF-80-333, CRF-80-300 and CRF-80-319) in the District Court of Cleveland County, State of Oklahoma, with the crime of commercial gambling under 21 O.S. Supp. 1975, § 982(A-2) (now codified as 21 O.S. 1981, § 982).

During Preliminary Hearing, the magistrate sustained the petitioners' demurrers to these informations because the informations were unclear as to the offenses committed. Specifically, the magistrate ruled that subsections A-1 and A-2 of 21 O.S. 1981, § 982 were unconstitutionally

vague and indefinite because he felt that it was impossible for a person of common understanding to recognize the activity that was prohibited. The magistrate further found that 21 O.S. 1981, § 981(4), which defines "gambling place", was also unconstitutionally broad and vague.

The State timely appealed the magistrate's rulings under Rule 6 of the Rules of the Oklahoma Court of Criminal Appeals. The magistrate's decision was affirmed by a judge of the district court, who determined that 21 O.S. 1981, § 982 was so broad in its scope and vague in its application that it was unconstitutional.

The State made a timely appeal to the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals in *State* v. *Koo*, 647 P.2d 889 (Okl. Cr. 1982), held that the petitioners were charged under 21 O.S. 1981, § 982(A-2), for "receiving bets"; that the term "receive" was not vague; that the terms "bet" and "chance", as defined in 21 O.S. 1981, § 981, were not lacking in either specificity or clarity; that 21 O.S. 1981, § 982(A-2), which defines commercial gambling in part as "receiving bets", was neither unconstitutionally vague nor overbroad; and that this statute contained sufficient notice of the activity prohibited and sufficient guidelines for its enforcement. From this opinion by the Oklahoma Court of Criminal Appeals, the petitioners now petition this Court for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DISMISS THE DISCRETIONARY REVIEW SOUGHT HEREIN SINCE THE DECISION RENDERED BELOW DOES NOT CONSTITUTE A "FINAL JUDGMENT" OF THE STATE CRIMINAL PROCEEDINGS PENDING AGAINST THE PETITIONERS.

The State of Oklahoma initially asserts that the Court should dismiss the writ sought in the instant matter because the decision rendered below by the Oklahoma Court of Criminal Appeals does not constitute a "final judgment" as that term is used in 28 U.S.C. § 1257(3), the statutory provision under which discretionary jurisdiction for review is sought. Although this Court has departed occasionally from the general rule and accepted piecemeal appellate review of state criminal proceedings, see generally *Harris* v. *Washington*, 404 U.S. 55 (1971), and *Mills* v. *Alabama*, 384 U.S. 214 (1966), the general rule is that a state criminal proceeding is not final for the purpose of review by this Court until the sentence is rendered. See *Eastman* v. *State*, 131 Ohio St. 1, 1 N.E.2d 140, *cert. denied*, 299 U.S. 505 (1936) (one of the pretrial issues rejected by the Ohio state court was that the statute under which the defendant was charged was unconstitutionally vague). In every instance where this Court has departed from the general rule, the Court has relied generally on the final-judgment rule's "collateral" exception first articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); that being, (1) the ruling below has fully disposed of the issue, thus in no sense, leaving it "open, unfinished or incon-

clusive"; (2) the decision was not simply a " 'step toward final disposition of the merits of the case [which would] be merged in final judgment,' [and thus,] has resolved an issue completely collateral to the cause of action asserted," *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (quoting *Cohen*, supra at 546);[1] and (3) "the decision had involved an important right which would be 'lost, possibly irreparably,' if review had to await final judgment [and] hence, to be effective, appellate review in that special, limited setting has to be immediate." *Id.* See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The instant matter meets none of these special circumstances warranting immediate review.

Rather, the petitioners in the instant matter seek review of the decision of the Oklahoma Court of Criminal Appeals which upheld the constitutionality of the Oklahoma commercial gambling statutes despite claims of vagueness and overbreadth and which allows the State to proceed to prosecute the petitioners on the alleged violations of the Oklahoma commercial gambling statutes. *State* v. *Koo*, 647 P.2d 889 (Okl.Cr. 1982). As opposed to the defendants in *Harris*, supra, and *Abney*, supra, where Fifth Amendment's rights against a second trial for the same offense were at stake, the petitioners cannot claim that immediate review is necessary in order to prevent the loss of an important right

[1] Although *Abney*, supra, pertains to an immediate review of a lower federal court's decision on a pretrial motion, the rationale used therein is applicable here. See also *United States* v. *MacDonald*, 435 U.S. 850 (1978) (order denying motion to dismiss indictment because of an alleged violation of Sixth Amendment right to a speedy trial is not a "final decision").

should review have to await final judgment. See also *Stack* v. *Boyle*, 342 U.S. 1 (1951) (right to bail before trial). The petitioners can only assert that review, at this time, should the Court rule on the merits in their favor, would prevent them from facing trial on the alleged charges. In another context, this Court has stated:

> "[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution could not by themselves be considered 'irreparable' in the special legal sense of the term. Instead, the threat to the plaintiff's federally protected rights must be one defense against a single criminal prosecution."

Younger v. *Harris*, 401 U.S. 37, 46 (1969). See also *United States* v. *MacDonald*, 435 U.S. 850, 861 (1978) ("Proceeding with the trial does not cause or compound the deprivation already suffered.") (speedy trial issue). The petitioners, as opposed to the defendant in *Mills*, supra, have not conceded that they have no other defense than the federal constitutional challenge to the criminal informations filed against them.

Secondly, the constitutional challenges herein are not collateral to the issue of petitioners' guilt or innocence. The challenges here are akin to a motion to dismiss an indictment for failure to state an offense. As noted by the Court in *Abney*, supra at 663, such an order is not a "final decision" for the purpose of immediate review since "it goes to the very heart of the issues to be resolved at the upcoming trial." Also, as noted in *Abney*, such an "issue resolved adversely to petitioners is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Id.* at 663. Should the

petitioners be convicted, the facts presented at trial will aid in the determination on appeal of whether the challenged statutes are so vague that a person of common understanding would be without notice of the prohibited activity set forth in the statute.

Thirdly, although the Oklahoma Court of Criminal Appeals has rendered a decision on the constitutionality of the penal statutes involved here, the petitioners are not precluded from reasserting their claim on direct appeal of their convictions should they be convicted at trial. See *Walls* v. *State,* 514 P.2d 404 (Okl.Cr. 1973) (wherein the Oklahoma court, pursuant to post-conviction relief, reconsidered its prior ruling regarding an issue of suppression of evidence). Thus, a decision by Oklahoma's highest criminal court on the issue is not necessarily preordained should the petitioners be convicted and properly raise and reassert the issue on direct appeal for reconsideration by the Oklahoma Court of Criminal Appeals.

In addition, the fact that the petitioners have argued that "the violation of a state gambling law is the first of three material elements required for federal prosecution of an 'illegal gambling business' pursuant to 18 U.S.C. § 1955" (see Petition for Writ of Certiorari at p.7), should not persuade or influence this Court to grant certiorari herein. The petitioners herein have not been charged under the federal statute. Furthermore, although the state court's ruling herein may be persuasive authority as to the constitutionality of the challenged statutes, lower federal courts are not bound by its decision on the federal constitutional issue asserted here.

To conclude, this Court should refrain from using its discretionary authority of review in cases concerning immediate piecemeal review of state criminal proceedings where, as here, no federally protected constitutional rights are at stake which will be lost should review be postponed until after trial and pronouncement of a criminal sentence. The State of Oklahoma respectfully requests this Court to dismiss the discretionary review sought herein.

II.

THE OKLAHOMA COMMERCIAL GAMBLING STATUTE WHICH PROHIBITS "RECEIVING A BET" IS NOT SO BROAD IN ITS SCOPE OR VAGUE IN ITS APPLICATION AS TO BE UNCONSTITUTIONAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION NOR IS IT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The petitioners contend that the Oklahoma Statute, 21 O.S. Supp. 1975, § 982(A-2) (hereinafter referred to as 21 O.S. 1981, § 982(A-2)) is repugnant to the Constitution of the United States and that it is in conflict with decisions of this Court because it is vague in application and overbroad in scope. In particular, the petitioners first assert that this statute is too vague and broad because the prohibited activities of commercial gambling under this statute cannot be recognized by a person of common understanding. Additionally, the petitioners allege that the Oklahoma Court of Criminal Appeals compounded the vagueness and broadness of this statute when it held that receiving a single bet can constitute commercial gambling under proper circumstances.

The second assertion that the Oklahoma Court of Criminal Appeals further broadened the meaning of the challenged statute has never been presented to the Oklahoma court for a determination. (See Petition for Rehearing, Appendix A hereto.) Therefore, this newly alleged argument is not properly before this Court. See *Street* v. *New York*, 394 U.S. 576, 581-82 (1969); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1968).

Moreover, this second assertion that a single bet constitutes commercial gambling is a proper interpretation of this penal statute because the "singular number includes the plural, and the plural the singular" in the penal statutes. 21 O.S. 1981, § 107. Thus, the word "bets" found in 21 O.S. 1981, § 982, would include the singular form.

Petitioners also assert that 21 O.S. 1981, § 982(A-2) is vague in its application and overbroad. It should be first noted that statutes are construed whenever possible so as to uphold their constitutionality and that statutes are afforded the presumption of constitutionality. *United States* v. *Vuitch*, 402 U.S. 62 (1971).

Another general rule is that due process requires that penal statutes must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harris*, 347 U.S. 612, 617 (1954), and clear standards are necessary "to prevent arbitrary arrests and convictions resting solely on unfettered discretion of police, judges and juries." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). See also *Papachristov* v. *Jacksonville*, 405 U.S. 156, 168 (1972). It is also worthy to note that "the constitution does not require impossible standards." A statute need only convey "sufficiently defi-

nite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 7-8 (1947); *Ruth* v. *United States*, 354 U.S. 476, 491 (1957).

Both petitioners in the present case were charged by information for the offense of commercial gambling in violation of 21 O.S. 1981, § 982 (A-2), which provides:

"A. Commercial gambling is:

* * *

2. Receiving, recording or forwarding bets or offers to bet or, with intent to receive, record or forward bets or offers to bet, possessing facilities to do so; . . . ."

This statute clearly defines the prohibited conduct of commercial gambling in a manner so that a person of common understanding or intelligence can understand the prohibited conduct. First, the terms "receive" and "commercial" express ideas which find adequate interpretation in common usage and understanding. See *Jump* v. *Goldenhersh*, 619 F.2d 11 (8th Cir. 1980). Second, the word "bet" is clearly defined in 21 O.S. Supp. 1975, § 981(1) (now codified as 21 O.S. 1981, § 981(1)). Thus, the phrase "receiving bets" is not unconstitutionally vague. See *United States* v. *Chiarizio*, 388 F.Supp. 858 (D.Conn. 1975) (where the Connecticut gambling statute was held to be sufficiently definite). See also *United States* v. *Cartano*, 534 F.2d 788 (8th Cir. 1976).

Moreover, a court need not find the language of a statute constitutional in all its possible applications to uphold constitutionality. *Griffin* v. *Breckinridge*, 403 U.S. 88

(1971); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). In *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973), the court stated:

> ". . . the difficulty of determining whether certain marginal cases are within the meaning of the language of a challenged criminal statute does not automatically render that statute unconstitutional for indefiniteness." 484 F.2d at 562.

The United States Court of Appeals in *United States* v. *Matya*, 541 F.2d 741 (8th Cir. 1976), when faced with an overbreadth argument, stated:

> "Defendant's overbreadth argument focuses upon the fact that, allegedly, the Nebraska statute might be read as encompassing such presumably innocent conduct as selling playing cards and reaching such presumably innocent persons as the itinerant purchaser of a lottery ticket. The Government admits that certain portions of the statute 'may not be admirably as narrow and precise as possible', and we agree. Inasmuch as defendants do not contend that the Nebraska legislature either could not or did not intend to proscribe their bookmaking activities, however, the mere fact that the statute is in some respects imprecise is of no consequence here. The overbreadth doctrine, far from being an expansive license by which courts routinely invalidate statutes which might have been drafted with more precision, is a doctrine whose function is 'limited . . . at the outset', *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 615, 93 S.Ct. 2908, and, specifically, a doctrine by which:
>
> Litigants . . . are permitted to challenge a statute [on its face] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from

> constitutionally protected speech or expression. *Id.* at 612, 93 S.Ct. at 2916. See *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 215-17, 95 S.Ct. 2268, 45 L.Ed.2d (1975); *Bigelow* v. *Virginia*, 421 U.S. 809, 815-17, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). Defendants do not suggest, and they would be hardpressed to do so, that any of the conduct arguably reached by the statute is properly characterized as free expression. Failing that, they cannot successfully invoke the overbreadth doctrine." 541 F.2d at 747-48.

Accordingly, whether a statute is unconstitutionally vague must be assessed in the context of the particular conduct to which it is being applied rather than a hypothetical situation. *United States* v. *Dacus*, 634 F.2d 441 (9th Cir. 1980). Therefore, the petitioners' betting hypothetical is irrelevant to the present case, especially since the petitioners have failed to even suggest that the statutory conduct is characterized as free expression. Thus, petitioners' overbreadth argument is without merit.

In conclusion, the mere fact that the petitioners are not pleased by the laws enacted by the Oklahoma Legislature or the interpretation thereof rendered by the Oklahoma Court of Criminal Appeals as to the gambling activities prohibited, does not render the challenged statutes unconstitutional. Title 21 O.S. 1981, § 982(A-2) which defines commercial gambling in part as "receiving bets" is not unconstitutionally vague or overbroad. It contains sufficient notice of the prohibited activity and sufficient guidelines for its enforcement. Accordingly, the petitioners' argument lacks merit and, thus, this Writ of Certiorari should be denied by this Court.

CONCLUSION

The matter now before this Court has not been finally resolved by the state courts. The petitioners still await trial for the alleged offenses. The petitioners cannot claim any important right will be "lost, possibly irreparably", if review had to await final judgment of the state criminal proceedings. In addition, the petitioners have failed to establish that the decision rendered by the state court stands in conflict with the Constitution of the United States or any applicable decision of this Court in interpretation of the Constitution. Moreover, the petitioners have asserted a new theory in support of their contention which was not presented to the state court below. The valuable judicial resources of this Court should not be expended on a review of this matter at this intermediate stage of the state criminal proceedings pending against the petitioners. Accordingly, this Petition should be dismissed.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

SUSAN TALBOT
Assistant Attorney General
Chief, Appellate Criminal Division

ROBERT C. SMITH, JR.
Assistant Attorney General

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel for Respondent

October, 1982

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

[Filed June 28, 1982]

STATE OF OKLAHOMA,	)	
Appellant,	)	
v.	)	
	)	No. O-81-75
GARY KOO and ANTHONY SALVATORE JACENE,	)	
Appellees.	)	

APPELLEES' PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT AND BRIEF IN SUPPORT THEREOF

The Appellees, Gary Koo and Anthony Salvator Jacene, petition for rehearing and reconsideration of the Opinion filed June 16, 1982, and reported at ..... O.B.A.J. ....., for the following reasons:

1. The Opinion failed to take into consideration the statutes and circumstances surrounding them, and their constitutionality as the general gambling statutes effect gambling as a whole, and particularly 21 O.S. §§981 and 982.

2. The Court failed to examine the appropriate case law requiring strict construction of penal statutes in favor of the accused, and that §982 of Title 21 cannot be sufficiently narrowed to be held constitutional.

3. The Court failed to take into consideration the Fourteenth Amendment of the Constitution of the United States, and Article II, Section 7 of the Oklahoma Constitution in determining whether the Oklahoma Commercial Gambling statute is so vague and uncertain and incapable of being understood by a person of ordinary intelligence so as to make the same unconstitutional.

[APPENDIX]

PROPOSITION I — THE OPINION FAILED TO TAKE INTO CONSIDERATION THE STATUTES AND CIRCUMSTANCES SURROUNDING THEM, AND THEIR CONSTITUTIONALITY AS THE GENERAL GAMBLING STATUTES EFFECT GAMBLING AS A WHOLE, AND PARTICULARLY 21 O.S. §§981 AND 982.

In the instant action, the State of Oklahoma appealed a ruling of the Honorable Mike McDanel, sitting as Magistrate at a preliminary hearing. The Court ruled 21 O.S. §§981 and 982, et seq., were unconstitutional. The Appellees, Gary Koo and Anthony Salvator Jacene were charged with violation of the Commercial Gambling Statutes. The charges specifically dealt with receiving bets on football, basketball and baseball games.

The State appealed under Rule 6 of the Rules of Criminal Procedure, and at that time the Honorable Thomas Walker, Associate District Judge, upheld the ruling of the lower Court. From this ruling the appealed was lodged with the Court of Criminal Appeals.

To be fully aware of the statutes and the circumstances surrounding them and their constitutionality it is necessary to look at the statutes in the State of Oklahoma as they effect gambling as a whole.

The general gambling statutes are found beginning at Title 21 O.S. §941. They deal with specific types of gambling and state as follows:

21 O.S. §941: Deals solely with poker, roulette, craps or any banking or percentage or gambling game played with dice, cards or any device for money, checks, credits or any representatives of value. The statute specifically states that these crimes are illegal.

21 O.S. §942: This statute states that any person who bets or plays at any of the prohibited games mentioned in §941 with cards, dice or other prohibited

devices which may be adapted to or used in playing any game of chance or in which chance is a material element shall be guilty of a misdemeanor.

21 O.S. §943: This statute refers to gambling paraphanalia, furniture or equipment used in violation of §941, which deals specfiically with poker, dice, cards, etc.

21 O.S. §944: This statute deals solely with slot machines.

21 O.S. §945: This statute prohibits the use of real estate or buildings for gambling purposes. Again it refers to the Act as a whole which is §941 which deals solely with poker, roulette, craps or any banking or percentage game.

21 O.S. §946: This statute has to do with the illegal use of buildings for games prohibited by §941. Again the specific games are delineated.

21 O.S. §947: This statute pertains to dice at a cigar stand.

21 O.S. §948: Deals with officers who are in collusion with gambling. It states the gambling games, cards, dice, dominoes, billiards, or any game of chance or gambling device by betting for money property or other things of value.

21 O.S. §949: This statute refers to enforcement of the gambling statute.

21 O.S. §950: This statute concerns receiving consideration for protection against arrest and conviction. Again this has to do with conviction under §941, which specifies poker, craps, etc.

21 O.S. §951: This statute pertains to investigation of alleged acts within the Article.

21 O.S. §952: This statute has to do with the severance of people charged.

[APPENDIX]

21 O.S. §953: This statute concerns accomplice testimony.

21 O.S. §954: This statute has to do with confidence games such as three-card monte.

21 O.S. §955: This statute concerns the duty of railroad employees.

21 O.S. §956: This statute deals with gambling in buildings or on grounds. It is again the same games prohibited by §941.

21 O.S. §957: This statute deals with leasing for gambling purposes as set forth in §941.

21 O.S. §958: This statute deals with leases that are void.

21 O.S. §959: This statute concerns witnesses failing to testify.

21 O.S. §960: This statute deals with seizure of apparatus suitable to be used for gambling purposes found in possession or under control of the persons so arrested, and has to do with the violations set forth in §941.

21 O.S. §961: This statute deals with testimony.

21 O.S. §962: This statute deals with the duty of officers to prosecute.

21 O.S. §964: This statute deals with slot machines and punch boards, and specifically defines a slot machine.

21 O.S. §965: This statute defines a "thing of value."

21 O.S. §966: This statute specifically defines a punch board.

21 O.S. §967: This statute refers to singular and plural words.

21 O.S. §968: This statute defines a "person."

21 O.S. §969: This statute concerns possession, sale or lease of slot machines or punch boards.

21 O.S. §970: This statute deals with slot machines.

21 O.S. §971: This statute deals with punch boards.

21 O.S. §972: This statute deals with slot machines and punch boards as gambling devices per se.

21 O.S. §973: This statute provides for seizure and confiscation of slot machines and punch boards.

21 O.S. §974: This statute relates to the duties of officers.

21 O.S. §975: This statute relates to evidence of knowledge of officers and prosecutors of the existence of slot machines or punch boards.

21 O.S. §976: This statute deals with failure of officers to prosecute.

21 O.S. §991: This statute deals with betting on races and specifically prohibits making book or mutuals upon the result of any trial of speed or power of endurance of animals or beasts.

21 O.S. §992: This statute deals with assisting unlawful business by telegraph dealing specifically with horse races.

21 O.S. §993: This statute concerns the evidence of prosecution.

These Statutes were passed in 1913, and there have been amendments to some and others have been repealed. Those listed are the statutes still on the books. As shown, they specifically set out what the graveamen of each charge is. In 21 O.S. §941 through 21 O.S. §963, they deal specifically with dice, poker and roulette. 21 O.S. §964 deals specifically with slot machines and punch boards and are

defined by statute. And 21 O.S. §991 deals specifically with horse racing. The statutes are clear and precise in their meaning and what they prohibit. They talk about prohibiting games such as poker, craps, roulette or something specifically known. They refer to prohibiting horse racing and slot machines. The Statutes do not talk in terms that ordinary people might have problems understanding exactly the prohibitions of the statutes.

Quite to the contrary, 21 O.S. §981 states that a bet is a bargain in which the parties agree that, *dependent upon chance*, or in which one of the parties to the transaction has a *reason to believe that it is dependent upon chance*, one stands to win or lose something of value specified in the agreement. The statute goes on to tell what it does not include, rather than what it does include. This definition of a bet must be applied with the rest of the statutes. The reason that these statutes do not pass constitutional muster is that the definition section, 981, is so nebulous and ambiguous that the same cannot afford a reasonable man an opportunity with which to know or have reason to know that he is doing something that may become violative of the law. The appeal should have been affirmed.

PROPOSITION II — THE COURT FAILED TO EXAMINE THE APPROPRIATE CASE LAW REQUIRING STRICT CONSTRUCTION OF PENAL STATUTES IN FAVOR OF THE ACCUSED, AND THAT §982 OF TITLE 21 CANNOT BE SUFFICIENTLY NARROWED TO BE HELD CONSTITUTIONAL.

To conform to due process, a statute creating an offense must explicitly define the conduct that is proscribed. See *Connally* v. *General Construction Company*, 269 U.S. 385, (1926). This basic rule of constitutional law must be considered in connection with the equally basic and important rule that penal statutes must be strictly construed.

The common link between those two rules is knowledge. Under our system of justice, which has in recent months been severely tested around the world, one can be held accountable only for that conduct that has been clearly defined and proscribed by the Legislature.

Penal Statutes Must be Strictly Construed

As the Court of Criminal Appeals stated in *State* v. *Lawrence*, 130 P. 508 (1913):

> "It may be stated as a general principle of criminal jurisprudence that penal statutes should be expressed in such language that every man of ordinary understanding may be able to know when he has committed a crime."

To insure that the people of Oklahoma are adequately informed of the laws of this State, the Court of Criminal Appeals has followed the rule that penal statutes must be strictly construed. As the Court observed in *Matthews* v. *Powers*, 425 P.2d 479, 482 (Okla.Cr. 1967):

> "A strict construction is to be applied to criminal statutes and courts should not extend them to embrace acts or conduct not clearly included within the prohibition of the statute. Person cannot be convicted of a crime unless the act which is committed is within both the letter and spirit of penal statute."

The importance of this rule to Oklahoma jurisprudence was emphasized by the Court in *Deleno* v. *State*, 168 P.2d 659 (Okla.Cr. 1946). In this case, the Court stated:

> "In passing upon the question here involved, it should be borne in mind that criminal statutes are not to be extended or enlarged by implication."

See also *Little* v. *State*, 32 P.2d 94 (Okl.Cr.); *Myers* v. *State*, 197 P. 884 (Okl. Cr.); *McDonald* v. *State*, 15 P.2d 149 (Okl. Cr.).

There is a long line of decisions that show the strength of the strict-penal statute rule construction. All criminal statutes in Oklahoma are to be strictly construed; and no such statute can be enlarged by implication. According to the Court of Criminal Appeals, Oklahoma courts will not sanction loose construction of statutes where life or liberty is involved; and strict interpretation must be followed in all instances. *Plumlee* v. *State*, 361 P.2d 223 (Okl.Cr. 1961).

Basic to this rule of strict construction is the principle that "there are no common law crimes in Oklahoma." *State* v. *Sandfer*, 226 P.2d 438, 441 (Okl.Cr. 1951). Since there are no common law crimes in Oklahoma, a court must limit its interpretation to the words of the statute. As the Court explained in the *Sandfer* case:

> "A primary rule of construction is that the intention of the Legislature is to be found (1) in the ordinary meaning of the words of a statute . . . *Id* at 442."

In an effort to preserve our constitutional heritage in the State of Oklahoma, our courts must be on a constant vigil to make sure that the overbearing power of government does not snuff out the claim of freedom. If conduct of a person in this State is to be prescribed and made criminal, the Courts should insist that the Legislature be very precise and specific.

This is a small price to pay for the preservation and endurance of life, liberty and the pursuit of happiness.

An Application of the Strict Construction Rule

Examples of *of* how Courts have given statutes a strict interpretation illustrates the strength of the rule.

A statute prohibiting the driving of an automobile while intoxicated was held not to apply to one in an in-

toxicated condition from an overdose of drugs taken at the prescription of a physician. See Sutherland, Statutes and Statutory Construction, §29.04, Fourth Edition, 1974, at 13-14, citing *People* v. *Koch*, 294 N.Y.Supp. 987 (1937).

Another penal statute narrowly construed, limited the hours of work of clerks selling drugs and medicines. The Court held that the clerk could work hours longer than those prescribed as long as the time of selling drugs was limited. See, *Ex porte Living*, 188 Cal. 761, 204 P. 1082 (1922).

In *United States* v. *Bergland*, 209 F.Supp. 547 (E.D. Wisc. 1962), the defendants were charged with illegal gambling. The indictment, however, was dismissed when it was shown that the element of "chance" was missing. As the Court explained the scheme of the defendants:

> "One or more of the defendants would attend the races, and when the winner of a race was announced, they would communicate the results by radio to a co-defendant who was outside the track. A codefendant would then immediately communicate the results by long distance telephone to a codefendant . . . who would place the bets with bookmakers who were unaware that the race was over and that the winner had been announced. *Id* at 548."

Another gambling case decided under the rule that penal statutes be strictly construed involved a defendant who lived in Ohio but who travelled across state lines into Kentucky to participate in a lottery. The defendants took the "official print" of the lucky lottery number after the number was drawn. They then headed back to Ohio with the slip showing the lucky number to pay off the winners. As they crossed the state line, the defendants were arrested. The Supreme Court made some interesting observations in ruling on the case. See *France* v. *United States*, 164 U.S. 676, 682-683 (1897):

[APPENDIX]

". . . The lottery had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. The language as used in the statute looks to the future. The papers must purport to be or represent an existing chance or interest which is dependent upon the event of a future drawing of the lottery. A paper that contains nothing but figures which in fact relate to a drawing that has already been completed, one that has passed and gone, cannot properly be said to be a paper, certificate or instrument as described in the statute. It purports to show no interest in or dependent upon the event of any lottery. If the lottery has been drawn, the interest is no longer dependent upon it. The condition upon which the bet or the interest was dependent has happened; the solution of the problem has already been arrived at; the bet has already been determined. The bare statement of that solution or determination placed on paper does not impart to that paper the character of a certificate or instrument purporting to be or represent a ticket, etc., dependent upon the event of a lottery. From the statement upon the paper, the agent may acquire the knowledge which will enable him to say who has won, but the book or the paper does not purport to be and is not a certificate, etc., within the act of Congress.

"There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on the way in the hands of messengers to the agents of the lottery in Cincinnati.

"The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannct sustain a conviction on that ground. Although the objection is a

narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

As explained by the Court in *United States* v. *Bergland*, supra:

> "It must be kept foremost in mind that these statutes — just as those involving lotteries, gift enterprises, and similar gambling schemes — are criminal statutes and, therefore, must be strictly construed.

One way Courts have applied a strict interpretation to gambling statutes is to rule that there was no violation under the statute unless it was alleged that the defendants were playing for money. See *Brown* v. *State*, 5 Okl.Cr. 41, 113 P. 219 (1911); *Noll* v. *State*, 10 Okl.Cr. 157, 135 P. 287 (1913); *Proctor* v. *State*, 9 Okl.Cr. 81, 130 P. 819 (1913).

In *Matthews* v. *Powers*, 425 P.2d 479 (Okla.Cr. 1967), the Court, following the rule that penal statutes must be strictly construed, stated that a horse race is not a gambling device. *Id* at 482. Quoting from *Jones* v. *State*, 4 Okla. 487, 112 P. 944, the *Matthews Case*, the Court stated:

> "It is a great perversion of a language to call a horse race a gambling devise. *Id* at 482."

The Arkansas Supreme Court, in *State* v. *Vaughn*, 81 Ark. 117, 98 S.W. 685 (1906), considered whether "betting

on horse racing is gambling within the meaning of the statutes against gaming." *Id* at 688. Gaming was defined by statute to be "betting any money, or any valuable thing on any *game of hazard* or skill." *Id* at 688. (Emphasis added) Horse racing was excluded from this statute because it was not a "game of hazard." Horse racing was considered a sport. *Id* at 688.

Baseball was on the other hand considered to be a game of skill. That horse racing is a sport and baseball is a game of skill, is a distinction upheld in *Mace* v. *State*, 58 Ark. 79, 22 S.W. 1108 (1893) In a dissenting opinion filed in the *Mace Case*, Judge Battle made this observation:

> *"In State v. Rorie, 23 Ark. 726, it was held that horse racing was not a game within the meaning of the statute which makes betting on 'any game of hazard or skill' an offense.* For the *reasons given for so* holding, I think that baseball is not such a game within the *meaning of the same statute."* Id at 1109.

A Texas Court reasoned that betting on games played at nine and ten-pin alleys was not an offense under a statute that made it illegal to bet on games, tables or banks which are prohibited by law. Since ten-pin alleys are licensed and taxed, they were not prohibited by law; therefore, no offense. *Chiles* v. *State*, 1 Tex. App. 27 (1876).

In another ten-pin alley case, *Crow* v. *State*, 6 Tex 334 (1851), the Court reasoned that this was a game and not a gambling device. Taking a literal definition of the word "device," the Court cited to Webster's and concluded that the word device "means artificial contrivance, stratagen." *Id* at 335. Also cited in support of a strict and narrow interpretation were two passages in the Bible:

> "He disappointeth the devices of the crafty." Job, V.
>
> "They imagined a mischievous device." Psalms, XXI (*Id* at 335)

Quotes from the Bible have also been used by the Oklahoma Court of Criminal Appeals in order to foster a strict interpretation of a criminal statute. In *Lock* v. *Falkenstine*, 380 P.2d 278 (Okl.Cr. 1963), the Court drew upon the Bible for support of a conclusion that fighting gamecocks were not animals as that term was used in a statute that prohibited the instigating of fights between animals. *Id* at 281.

The important thing about the *Falkenstine Case* is the Court's strong adherence to the basic propcsition that penal statutes must be made clear by the Legislature. Citing to authority from the United States Supreme Court, the Oklahoma Court emphasized that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it . . ." *Id* at 281.

How Strict Will the Court Read
A Penal Statute?

There are two ways to approach this question. Under the Constitutional standard of due process, the question would be: How explicit must the wording of the statute be? This question is answered in terms of knowledge. As the Supreme Court observed in *United States* v. *Reese*, 92 U.S. 214, as cited in *Lock* v. *Falkenstine*, supra:

> "Every man should be able to know with certainty when he is committing a crime."

A penal statute in Constitutional terms, must be expressed in "language that need nct deceive the common mind. *Id* at 281. Following the rule that penal statutes will be strictly construed, the question arises as to how rigid and strict will the Court read the statute.

How rigid will a Court read a penal statute? Sutherland, in response to this, states:

> "That the more severe the penalty, and the more disastrous the consequences to the person . . . the

more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law." Sutherland, supra, Sec. 29.03 at 7, citing *Bell* v. *United States,* 349 U.S. 81 (1955).

This flexible approach to reading statutes has been approved by the Oklahoma Court of Criminal Appeals. In *State* v. *Lawrence,* 9 Okl.Cr. 16, 130 P. 508 (1913), the Court stated:

> "Greater certainty in describing an offense is never necessary than the nature of the subject-matter dealt with." *Id* at 509.

The point is made even clearer in *Johnson* v. *State,* 10 Okl.Cr. 597, 140 P. 622 (1914). In that case, the Court upheld a gambling conviction that drew a fine of $500.00 and confinement in the County Jail for a period of 60 days. *Id* at 623. Reference was made by the Court to the view that the gambling statutes should receive a liberal construction.

Although the Court did speak of liberal interpretation, the Court stated that "we have not overlooked the fact that there are authorities which sustain a more strict construction." *Id* at 625. These cases, however, were found by the Court to involve felony indictments.

As to how rigid a penal statute will be read, the Oklahoma Court of Criminal Appeals stated:

> "All courts are more careful in extending the doctrine of liberal construction in felony that in misdemeanor cases."

Application of a Penal Statute Rule to the Present Case

Following the standard expressed by Sutherland, "that the more severe the penalty . . . the more rigid will be the construction," the facts in the present case call for the

most severe and narrow reading of the Oklahoma Commercial Gambling Statute, T 21 Okla. Stat. §982.

In the present case, the Defendants do not face a misdemeanor charge that carries a relatively small fine.

Considering the Oklahoma law alone, the Defendants, if convicted of violating the Commercial Gambling Statute, face a fine of not more than $25,000.00, and imprisonment of not more than 10 years. 21 O.S. §982.

Following the strict test adopted by the Oklahoma Court of Criminal Appeals, the Commercial Gambling Statute cannot withstand a constitutional test. Because it is so general and indefinite, it cannot be sufficiently narrowed by construction. It should, therefore, be held unconstitutional and void.

PROPOSITION III — THE COURT FAILED TO TAKE INTO CONSIDERATION THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE II, SECTION 7 OF THE OKLAHOMA CONSTITUTION IN DETERMINING WHETHER THE OKLAHOMA COMMERCIAL GAMBLING STATUTE IS SO VAGUE AND UNCERTAIN AND INCAPABLE OF BEING UNDERSTOOD BY A PERSON OF ORDINARY INTELLIGENCE SO AS TO MAKE THE SAME UNCONSTITUTIONAL

The United States Supreme Court has stated:

> "That when a court is required to pass on the constitutionality of an act, the Court assumes 'the gravest and most delicate duty that this court is called on to perform'."

Fullilove v. *Klutznick*, 100 S.Ct. 758 (1980).

The Constitutional Standard

A good starting point with the Constitutional requirement for specificity would be with the point previously made about the rule that penal statutes be strictly construed. "The more severe the penalty, and the more disastrous the consequences to the person . . . the more rigid will be the construction of its provisions." Sutherland, supra, Section 59.03 at 7.

Applied to the due process requirement that criminal statutes be clear and understandable, the severity of the penalty involved will affect the degree of specificity required of the Legislature. As the due process concept has been explained by the Supreme Court:

> "Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed . . . (And) Where First Amendment rights are involved, an even greater degree of specificity' is required." *Buckley* v. *Valeo*, 96 S.Ct. 612, 662 (1976).

Where, as in the present case, a defendant faces the deprivation of liberty for such a long period of time, there is a heavy requirement placed on the Oklahoma Legislature to a high degree of specificity. Any other, more lenient standard, would weaken our system of justice that holds sacred the freedom and liberty of individuals. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Rewis* v. *United States*, 401 U.S. 808 (1971). As the Supreme Court has suggested in these cases, we must not dilute important constitutional safeguards out of some urge to reach detestable criminal elements. *Moore* v. *State*, 53 Nev. 831, 74 N.W. 319, 324 (1898).

In *Lock* v. *Falkenstine*, 380 P.2d 278 (Okl.Cr. 1963), the Oklahoma Court of Criminal Appeals presented a help-

ful "judicial yardstick" in determining the constitutional validity of a criminal statute. With a series of posed questions, the Court succinctly presents the issue:

> "Is the statute clear and explicit? Is it certain? Can a man of ordinary intelligence understand it? Does it deceive the common mind? Does a person of ordinary intelligence know when the statute is being violated? Can the Court judicially determine the Legislative intent?" *Id* at 282

The Court further suggested that answers to these questions should come from the excerpts presented from several United States Supreme Court cases — although somewhat lengthly, the Court in *Lock* v. *Falkenstine*, supra, presented the following:

> "In determining the constitutionality of a statute, we are guided by previous decisions of this and other jurisdictions. In the case of *Connally* v. *General Const. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, wherein the Court said:
>
> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In *United States* v. *Brewer*, 139 U.S. 278, 11 S.Ct. 538, 35 L.Ed. 190, the Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know

what acts it is their duty to avoid. . . . Before a man can be punished, his case must be plainly and unmistakably within the statute."

See also, *United States* v. *Lacker*, 134 U.S. 624-628, 10 S.Ct. 625, 33 L.Ed. 1080.

Also it is stated in Ruling Case Law, Volume 25, §64:

"Statutes which create and provide for the punishment of criminal offenses should be so clear and explicit that all persons of ordinary intelligence who are subject to these penalties may understand their provisions. If the meaning of a criminal statute cannot be judicially ascertained, or if in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain."

The language adopted in *United States* v. *Reese*, 92 U.S. 214, 23 L.Ed. 563, is highly pleasing to this Court:

"Penal statutes ought not to be expressed in language so uncertain. If the legislature *undertakes to define, by statutes, a new offense and provides for its punishment, it should express its will in language that need not deceive the common mind.* Every man should be able to know with certainty when he is committing a crime. *It would certainly be dangerous if the Legislature could set a net large enough to catch* all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *Id* at 281.

The Supreme Court has been clear on the issue that a statute is void for vagueness when its prohibitions are not

clearly defined. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). In *Grayned*, the Court stated:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them . . . Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . then if the boundaries of the forbidden areas were clearly marked'." *Id* at 108-109.

In *Smith* v. *Goguen*, 94 S.Ct. 1242 (1974), the Supreme Court recognized that there are times when a statute is so devoid of standards that the constitutional defects of vagueness cannot be cured by judicial narrow construction. *Id* at 1248. As the Court stated:

> "We are without authority to cure that defect. Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislators may not so abdicate their responsibilities for setting the standards of the criminal law." *Id* at 1248.

The Court concluded that: "Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process." *Id* at 1248. *Smith* v. *Goguen*, makes the important point that the identity of the person claiming due process rights is immaterial. In that case, the defendant had been charged with the act of treat-

ing "contemptuously the flag of the United States." *Id* at 1245. He wore the flag on the seat of his blue jeans.

Regardless of the identity of the accused, due process "requires that all 'be informed as to what the State commands or forbids. . . .' and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law." *Id* at 1248. What made the statute unconstitutionally vague in the *Smith Case* was the word "contemptuously." As the Court observed:

> "What is contemptuous to one man may be a work of art to another." *Id* at 1247.

Oklahoma has since statehood been in the forefront of those that recognized and protected the rights of persons accused of violating a criminal statute. It is and always has been the law of Oklahoma that "there are no common law crimes and no act is a crime unless it is made so by statute. *Hisel* v. *State*, 97 Okl.Cr. 356, 264 P.2d 375 (1953).

When a person is charged under a penal statute and faces the powerful arm of the government, there have from statehood been carefully delineated constitutional protections. As the Court observed in *State* v. *Lawrence*, 9 Okla. Cr. 16, 130 P. 508 (1913):

> "*Our Constitution* provides that in all criminal *prosecutions* the accused shall be informed of the *nature and cause* of the accusation against him, and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf, and that he shall have the right to be heard by himself and counsel." *Id* at 509.

After recognizing those portions of the Oklahoma Constitution that protect all people from the arbitrary power of government, and thereby trying, the Court in *Lawrence*, went on to emphasize the need to preserve intact all por-

tions of the Constitution, particularly those dealing with the rights of an accused to be informed. In *State* v. *Lawrence*, the Court stated:

> "This provision of the Constitution would become nugatory if the Legislature could create a crime in such broad and indefinite language that a citizen charged with a violation of such statute would not know what he must prepare to defend against, and where the court and jury would be without a fixed standard to determine what acts would constitute such offense. Penal statutes ought not to be expressed in language so uncertain as to mislead or deceive the common mind. It may be stated as a general principle of criminal jurisprudence that penal statutes should be expressed in such language that every man of ordinary understanding may be able to know when he has committed a crime. If this is not true, then to a large extent the judicial would be substituted for the legislative department of the state." *Id* at 509.

The responsibility placed on courts to safeguard the rights of the people, including those accused of crimes, was strongly emphasized by the Court in *Ex porte Hunnicutt*, 7 Okl.Cr. 213, 123 P. 179 (1912). That Court stated:

> "Any act of the Legislature which interferes with or deprives a party charged with a crime of *a single right* guaranteed to him by the Constitution is, to this extent, unconstitutional; and it is the duty of the courts when they find that an irreconcilable conflict exists between an act of the Legislature and the Constitution of the state, to declare that such act is unconstitutional and void, and thereby vindicate the supremacy of the Constitution." *Id* at 183.

When criminal statutes are vague, uncertain and overbroad, the accused cannot be adequately informed. He is unaware when he crosses the prosecribed line of conduct;

and, he is forced to bend to the arbitrary decision of police officers. A statute that is so vague as to impose no clear restrictions on the exercise of policy authority is unconstitutional. Such is a denial of due process. *Hayes* v. *Municipal Court of Oklahoma City*, 487 P.2d 974 (Okl.Cr. 1971). See also, *Powers* v. *Owen*, 419 P.2d 277 (Okla. Cr. 1966); *Cole* v. *State*, 511 P.2d 593 (Okla.Cr. 1973).

The Oklahoma Commercial Gambling Statute is one of those statutes that is so vague and unclear that persons of ordinary intelligence are incapable of understanding. Whether a person is to be charged under the statute is left to the arbitrary decision of the police and prosecuting attorneys.

Constitutional Due Process
Standards Applied

The Defendants have been charged with violating 21 O.S. §982, which is as follows:

> "§982. Commercial gambling — A. Commercial gambling is:
>
> "1. Operating or receiving all or part of the earnings of a gambling place;
>
> "2. Receiving, recording or forwarding bets or offers to bet or, with intent to receive, record or forward bets or offers to bet, possessing facilities to do so;
>
> "3. For gain, becoming a custodian of anything of value bet or offered to be bet;
>
> "4. Conducting a lottery or with intent to conduct a lottery possessing facilities to do so;
>
> "5. Setting up for use or collecting the proceeds of any gambling devise; or
>
> "6. Alone or with others, owning, controlling, managing or financing a *gambling business*.

"B. Any person found guilty of commercial gambling shall be punished by imprisonment for not more than ten (10) years or a fine of not more than twenty-Five Thosand Dollars ($25,000.00), or by both such fine and imprisonment."

On its face, Section 982 read in light of Section 981 is a good example of poor legislative drafting. A person of reasonable intelligence cannot possibly understand the scope of the statute. In light of the severity of the punishment involved, this Court should not add clarity through interpretation. The task of making the statute clear should be left to the Legislature.

The most glaring and defective thing about Section 982 is in knowing who can be arrested and charged with a felony. This was the same error that caused the Oklahoma Court of Criminal Appeals to strike down as being unconstitutionally vague a loitering ordinance. *Hayes* v. *Municipal Court of Oklahoma City*, supra.

The ordinance challenged in *Hayes* made it unlawful during certain hours for any person to loiter or wander aimlessly upon or about the streets "without lawful authority or permission to do so." *Id* at 975. Striking down the ordinance as being unconstitutionally vague, the Court observed that there were *no standards*. It is left to the policeman on the beat to decide if a person should be arrested under the ordinance. This was considered repugnant to the Court in the *Hayes Case*. As to the decision making process, showing vagueness and uncertainty, the Court stated:

"Nor is the vagueness of "loiter and wander" salvaged when coupled with the proviso to give "a lawful reason for being at such place at such time" since this language is equally vague and uncertain in meaning as well as unduly placing the burden of proof on a pedestrian to demonstrate that he is not engaged in criminal activity. Indeed, this aspect of the ordi-

nance is even more offensive. As to its vagueness, what constitutes a "lawful reason?" Must one demonstrate he is engaged in occupational employment, or will a special visit or mere walk without destination qualify? Here again, whose standards determine the lawfulness of the reason? The officer, the court, the prosecutor, or the citizen? *Not only is there no standard for the officer, but also the citizen has no way of knowing until after his arrest if he had a lawful reason for being on the street. To be safe, should one get police permission to be on the streets?"*

As to who can be arrested and charged with a felony, the Commercial Gambling Statute is more offensive to constitutional safeguards than the ordinance in the *Hayes Case*. A literal reading of the Commercial Gambling Statute, which must be done since it is a penal statute, clearly shows that almost everybody but the culprit-gambler can be arrested and charged under Section 982 of the Commercial Gambling Statute. *The gambler was excluded or omitted from the statute.*

Since gamblers were not included within the scope of Section 982 by the Legislature, they cannot be brought within the operation of the statute by judicial construction. *First Nat. Bank* v. *National Live Stock Bank*, 13 Okl. 719, 76 P. 130 (1904), affd. 203 U.S. 296. Iu Oklahoma, the Court of Criminal Appeals has consistently refused to extend terms of penal statute beyond clear legal meaning. *Rhodes* v. *State*, 30 Okl.Cr. 2, 234 P. 645 (1925).

An examination of the enumerations under Section 982 will clearly indicate that the art of gambling is not included. Neither is betting or wagering made illegal in any explicit terms. Section 981 does define the term "bet"; however, the legislature did not follow through and make illegal the art of betting, wagering or gambling.

The clear language of Section 982 makes it clear that the legislature did a hasty but poor drafting job. It would appear that the legislature inadvertently left a section out of the statute. For example, in Section 981, the term "consideration" is defined; however, the term is not used or even referred to in any other section of the statute. 21 O.S. §§981-988.

Exclusion of the main character of commercial gambling leaves all of the enumerations under Section 982 vague and uncertain as to the person subject to arrest by the police officer under a felony charge. There is, of course, reference to the term "commercial gambler"; however, this term has no resemblance to the definition of the word "gambler."

According to Webster's a "gambler" is one who gambles; and "gambling" is the "action of one who gambles." Webster then defines the term "gamble" as "to play or game for money or other stake." Gamble is defined as a transaction that involves risk. Black's Law Dictionary supports the ordinary meaning of the word "gamble" as found in Webster. Definitions given for the word "gamble" include the following:

> Black's Law Dictionary 808 (4th Ed. 1951):
> Gamble: To play . . . for money or other stake . . . *State* v. *Mint Vending Machine*, 85 N.W. 22, 154 A. 224, 226.
>
> The word "gamble" is perhaps the most apt and substantial to convey the idea of unlawful play that our language affords. It is inclusive of hazarding and betting as well as playing. *Allen* v. *Commonwealth*, 178 Ky. 250 198 S.W. 896, 897.

Accepting the ordinary meaning of the word "gamble," one must conclude that the word includes the actual act that involves the risk of loss or gain. Section 981 follows this to a point. It defines a "bet" as a "bargain in which

the parties agree that, *dependent upon chance*, . . . one stands to win or lose something of value specified in the agreement."

Since the legislature defined the term "bet" in Section 981, one could reasonably expect that the legislature was intending to reach the actual act of betting. With its very poor drafting, however, the very part of the transaction involving "chance" or "risk" was omitted. The one who gambles or bets and takes a risk of winning or losing is simply not included in Section 982.

In Section 982, the Oklahoma Legislature defined commercial gambling as follows:

> "1. Operating or receiving all or part of the earning of a gambling place:"

This enumeration under Section 982 does not necessarily reach a person who is actually gambling in the ordinary sense. When this enumeration is considered in light of enumeration Number 6, there is substantial confusion as to the persons who would be included. The first item describes a person who operates or who receives "all or part of the earnings of a gambling place."

From this language the reference to an operator who receives all of the earnings of a gambling place would be a person who owns the operation. Item Number 6 under Section 982 includes persons who own, control, manage or finance a *gambling business*.

There is either unnecessary duplication in wording between Item 1 and Item 2 under Section 982, or, the Legislature had reference to two separate groups of persons. That there was duplication would bear out the clearer impression that the Oklahoma Legislature did a poor drafting job. On the other hand, following the presumption that the Legislature does not insert useless words, it becomes necessary to attempt to reconcile items 1 and 6.

There is one difference between the two items. The first refers to "gambling place"; and Item 6 refers to "gambling business" which is a term that was not defined by the Legislature. As to the reference to the persons included within the language of the two items, there is nothing but confusion that can be resolved only after the police exercises an arbitrary judgment and makes an arrest.

Persons falling within Item Number 1 under Section 982 would seem to include persons who operate as well as persons who own a gambling place. There is, however, two sources of confusion that make it impossible for any person of ordinary intelligence to understand if they fall within the statutory classification.

First, Item 1 under Section 982 is confusing as a result of the definition of the term "gambling place." As defined in Section 981, a "gambling place" is any place . . . "used for any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet, conducting lotteries; or playing gambling devices."

With the disjunctive "or" separating the sub-enumerations a place can be classed as a "gambling place" if it is used for any one of the items listed. Since this statutory item does not specify the degree to which a place has to be used for the conduct listed, it could include any number of places.

With two Baptists making a friendly bet on the O.U.-Texas football game during their Sunday School class, the Church would become a place "used for . . . making and setting bets" under Section 982. The Church Pastor and the Deacons could then be charged with commercial gambling and sent to prison for 10 years.

This would be an absurd incident; however, when such absurdity can be drawn from the language of a criminal statute, there is strong evidence that the statute is vague and uncertain. When such absurdities can be raised, it is

the appropriate time for the Court to strike down the statute as being unconstitutional.

If the Baptist Church can fit the definition of a "gambling place," the police have unlimited discretion under the statute. It is this type of unbridled discretion that can be arbitrarily exercised that causes courts to rule unconstitutional such broad statutes. *Hayes* v. *Municipal Court of Oklahoma City*, supra.

Another term that makes Item 1 under Section 982 more uncertain is "earnings of a gambling place." Under this language, who is subject to arrest for engaging in "commercial gambling?" Assuming for a moment that there is a place where bets are made, lotteries, gambling devices, etc. — a gambling place. Would employees being paid a salary be subject to commercial gambling charges?

It has been held that the term "earnings" is used to denote a larger class of people that those receiving only "wages." *Somers* v. *Keliher*, 115 Mass. 165; *Jenks* v. *Dyer*, 102 Mass. 235, cited in Black's Law Dictionary 598 (4th Ed. 1951). Did the Oklahoma Legislature have reference to salaried people when it used the term "earnings"? With a question raised, the first resolution must come from the unlimited-arbitrary discretion of police officers.

From the word "earnings" of a gambling place, there is still greater confusion that cannot be resolved by a person of ordinary intelligence. Did the Oklahoma Legislatre mean for this term to include "gross earnings" or only "net earnings?" See Black's, supra, at 599.

If the statutory term has reference to "net earnings," the class of people subject to arrest under Item 1 of Section 982 would depend on the profit and loss statement of the gambling place. Further confusion is caused if the gambling place also serves as a commercial store.

Can a person become subject to arrest under Section 982 if he received part of the earnings derived from sales

of televisions when in the back of the store, bets were being received? The statute as drafted by the Legislature simply does not narrow the scope of a "gambling place" to a place that receives all or substantially all of its income from betting.

This vagueness in Item 1 of Section 982 makes that part of the statute constitutionally defective. Under all of the authorities cited, a Court cannot correct the mistakes of the Legislaure in defining a criminal offense. All crimes must now come from one source — the Legislature.

> *Receiving, Recording or Forwarding Bets or Offers to Bet or, with Intent to Receive, Record or Forward Bets or Offers to Bet, Possessing Facilities to do so.*

This is an awkwardly worded section of law, a violation of which could cause a person to forfeit a fine of $25,000.00 as well as the loss of freedom for up to 10 years. And what does it mean?

As worded, it would appear that this section defines commercial gambling as:

(a) receiving, recording or forwarding bets;

(b) receiving, recording or forwarding offers to bets; or

(c) if one possesses the facilities to receive, record or forward bets, the person's "intent" alone becomes commercial gambling.

As this section is broken down, it is clear that one with reasonable intelligence could not comprehend the conduct made criminal by Section 982. It is difficult to imagine the severe penalty that one faces for violating a section so totally vague and uncertain.

Since each of us is likely to have a telephone in our homes and offices, we possess the facilities to receive and

forward bets. With a simple electronic recorder attached to our telephone, we would even have the capacity to record bets or offers to bet. With these facilities, we are subject to arrest if some police officer believes that we intend to use our telephone to receive, record or forward bets.

This makes this section of Section 982 constitutionally defective; it is void for vagueness. *Hayes* v. *Municipal Court of Oklahoma City*, supra. But this is not the only defect in Item 2 of Section 982.

As indicated earlier, the Oklahoma Commercial Gambling Statute does not make it commercial gambling for one to make a bet. What the statute reaches is the act of "receiving, recording or forwarding" bets. This would reach hired personnel, secretaries, clerks, etc.; however, the person who is actually betting can escape prosecution.

Item 2 of Section 982 can reach persons that the Oklahoma Legislature surely had no interest in subjecting to felony charges. The gravamen of the Commercial Gambling Statute appears to be expressed in the definition of bet. Under Section 981, "A 'bet' is a bargain in which the parties agree that, *dependent upon chance*, . . . one stands to win or lose something of value specified in the agreement."

It would appear, as a guess, that the Legislature was attempting to reach the act of gambling and the connecting risk or chance of loss or gain. As the statute is worded in Item 2 of Section 982, the persons subject to arrest are those who may face no risk or chance of loss.

A person paid a salary and nothing else could be charged with a felony by "receiving, recording or forwarding bets." This loose wording of the statute actually defeats the probable purpose of the statute; however, this is not for a court to consider. Legislative mistakes in criminal statutes can only be adjudged by the Legislature.

Still another confusing area in the wording of Item 2 under Section 982 relates to what things can be received, recorded or forwarded. As Item 2 is worded, it is the receiving, recording or forwarding of bets that is commercial gambling. But under Section 981 "bets" are defined as transactions dependent upon chance.

Question: What about bets that are not based on chance? Courts make a distinction between the element of chance and the element of skill. They also make a distinction between games and sports. *State* v. *Vaughn*, 81 Ark. 117, 98 S.W. 685 (1906); *Mace* v. *State*, 58 Ark. 79, 22 S.W. 1108 (1893); *Delano* v. *State*, 82 Okl.Cr. 258, 168 P.2d 659 (1946).

On the issue of "chance" the court in *People* v. *Lavin*, 179 N.Y. 164, 71 N.E. 753 (Ct. of App. 1904), made a philosophical analysis of the word. It stated:

> "It is not *necessary to enter* into a very elaborate *discussion of what* constitutes chance. Nearly all people at this day believe (however inconsistent their conduct at times may be with such belief) that the laws of nature are uniform and that all phenomena or occurrences are the necessary effect of antecedent causes operating according to fixed laws. 'It is strictly and philosophically true in nature and reason that there is no such thing *as chance or accident*; it being evident that these words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely men's ignorance of the real and immediate cause.' *But, though nothing* occurs in the *world as a result of chance*, the occurrence may be a *matter of chance* to the observer from his ignorance of antecedent causes or of the laws of their operation. If one is told to draw from a box of which he is informed simply that it contains black balls and white balls, it is to him a matter of equal chance whether he

draws a black one or a white one, and this though in fact the box contains ninety-one of one kind and one of the other. Nor would the chances to him be at all changed if he were told that there were ninety-nine of one kind and one of the other, unless he was told of which color the ninety-nine were. *Therefore that may be a matter of chance to one man which is not a matter of chance to another*, and with different men the chances of the occurrence of any event may differ greatly. It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non occurrence, or the forms and conditions of its occurrence.

". . .

"From this the learned judge concluded that the distribution would not depend exclusively on chance, but, to some extent at least, be affected by the *exercise of judgment*, and that, therefore, the scheme did not constitute a lottery. 'Pure chance' is defined by Black in his Law Dictionary to be 'the entire absence of all means of calculating results,' and if, to constitute a lottery, it is necessary that the distribution should be purely by chance, without any other element affecting the result." *Id* at 754.

For other cases that discuss the meaning of the element of chance, see *United States* v. *Rich*, 90 F.Supp. 624 (E.D. Ill. 1950); *Engle* v. *State*, 90 P.2d 988 (Ariz. 1939); *Wells* v. *J. C. Penney Company*, 250 F.2d 221 (9th Cir. 1957). Under the Oklahoma statute, there is legislative language that helps resolve the scope of the phrase "dependent upon chance" as used in definition of bet.

When the legislature first used the word "chance" it must have had reference to those items listed under the definition of "gambling device" found in sub-paragraph 3 of Section 981. That section provides as follows:

"3. A 'gambling device' is a contrivance designed primarily for gambling purposes which for a consideration affords the player an opportunity to obtain something of value, *the award of which is determined by chance, or any token, chip, paper, receipt or other document* which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device; (Emphasis added)

Whether the meaning of the word "chance" can be firmly resolved, its use in the statute causes great confusion as to the persons subjected to arrest. Since there is a distinction between events of skill and chance, the scope of Item 2 under Section 982 is limited.

The problem is in determining how far the word "chance" limits the word "bet" which in term restricts the scope of Section 982, Item 2. Because of this irresolvable vagueness and uncertainty, it cannot withstand a constitutional test.

For Gain, Becoming a Custodian of Anything of Value Bet or Offered to be Bet

On its face, this part of Section 982 is constitutionally defective as being vague and uncertain. The language reaches all persons who may knowingly or unknowingly become custodian of anything of value bet or anything of value that is offered to be bet.

Who can be included within this broad language? Large commercial banks that rent out safe deposit boxes can become the custodians for gain of gambling money. The banks would of course have no knowledge of the matter; however, under this portion of Section 982 there is no knowledge required.

[APPENDIX]

As Item 3 of Section 982 is worded, a custodian can be totally innocent of any wrongdoing and still become subject to a felony charge. A possible scenario to show the scope of this section of Section 982:

> "Hey kid, hold this bag for me; I'll give you a dime."

Without knowing it that kid committed a felony if the bag contained money or other things of value to bet or offered to be bet. The kid became a custodian for gain; he was given a dime. His intent or knowledge about the matter is immaterial, at least as that section of the Act is worded.

On the other hand, a partner of some notorious gambler could escape. The same scenario as with the kid, but this time with a well-known notorious professional gambler:

> "Hey Joe, do me a *favor*, how about holding this bag of money that I received in offers to bet?"

Joe does a favor and becomes a custodian of gambling money but for no gain. Since he takes nothing for his services as custodian of the money that he knows comes from gambling, he cannot be prosecuted. An absurd result.

As absurd as this interpretation of Item 3 of Section 982 might be, it is an accurate interpretation of the clear and unambiguous language. For the Section as worded to reach the persons that the legislature intended to include, a court would have to amend the wording to include omitted data. This judicial adjustment would be contrary to the laws of this State.

Ambiguites in criminal statutes are resolved in favor of the accused. *State* v. *Hamilton*, 298 P.2d 1073 (Okl.Cr. 1956). An important facet of the rule that requires penal statutes to be strictly construed is that uncertainty in language cannot be clarified by resorting to legislative intent

or purpose. As stated in *Hisel* v. *State*, 97 Okla.Cr. 356, 265 P.2d 375, 385 (1953):

> "In Oklahoma there are no common law crimes and no act is a crime unless it is made so by statute. In this connection it is established law that penal statutes are to be interpreted strictly against the state and liberally in favor of the accused, *and words not found in the text of a criminal statute will not be read in for the purpose of extending it or giving it an interpretation in conformity with a supposed policy.* (Emphasis added)

A penal statute must stand or fall on the basis of the words of the statute. When a court goes beyond that, it is creating crimes. This, however, must be reserved for the legislature; otherwise, our total system of government is destroyed. The people will be left uninformed and made subject to the arbitrary decisions of the police.

In *Matthews* v. *Powers*, 425 P.2d 479 (Okl.Cr. 1967), the Court raised considerable doubt about the gambling statute in Oklahoma. The Court stated:

> 'We observe that the Legislature now meets each year. We therefore suggest that any corrective legislation to satisfy complaints arising out of matters of this nature should be provided by the legislative branch of government. It is not the function, nor the purpose, of the courts to legislate." *Id* at 482-483.

A person would have to look at the definition of the statute in question before they could understand what the offense charged is. The first thing that you see is that a bet is a transaction dependent upon chance. Chance has been defined in Black's Law Dictionary as the absence of explainable or controllable causation. Accident; hazard; result or issue of uncertain or unknown forces; risks; the opposite of intention, design or contrivance. Chance has

further been defined under some cases as absence of explainable or controllable causation. *DeWitt Motor Company* v. *Voznerk*, 169 N.E.2d 650. Chance has also been defined as something accidental or undesigned. *People* v. *Schapiro*, 77 N.Y.Supp.2d 726. *U.S.* v. *Rich*, 90 F.Supp. 624, states that the word chance refers to attempt to obtain certain ends not by skill or rule, or fixed rule, but by the happening of a subsequent event incapable of ascertaining accomplishment by means of human force or action or ingenuity.

The instant charges in this case, which has to do with betting on football, baseball and basketball, all games of skill, all with results that are clearly understandable and clearly explained and in many instances foreseeable. This does not have anything to do with chance. One must wonder if the statute involved in the case at bar is certain? With the definition as nebulous as "chance", something unexplained, you cannot possibly have a statute that is definite. You look at the three definitions, and not only is chance nebulous; a bet is a transaction dependent upon chance.

"Gambling place" is equally uncertain. You can have evidence of people who are known gamblers coming in that can show it is a gambling place. This is clearly uncertain as to what is a gambling place. As stated in the example previously stated, clearly illustrates this point.

Can a man of ordinary intelligence understand this? Men of ordinary intelligence, when they look at chance, think of a dice game, or possibly a blackjack game. A man of ordinary intelligence realizes that poker has an element of chance, but there is an element of skill. Most card games do have an element of skill, albeit knowing the percentages, possibly being able to remember cards that have been played, that there is still some skill in it. Skill is not part of the definition of chance. Therefore, it seems that these statutes were aimed at commercial gambling.

As shown by their application they are aimed at bookmaking for football, basketball and baseball games. Men of ordinary intelligence in reading the definition would say that these games are dependent upon skill, knowledge and ability, and that the outcome is dependent upon the same. What we have in this instance is whether ordinary intelligence could reasonably differ as to what a bet, when it is dependent upon chance, really means. A bet dependent upon chance might be betting on a seven in a crap game. It might be betting on a 32 on a roulette wheel, or betting on a 21 in a blackjack game. Clearly this is chance, not picking which team is the best. Not picking which team because of a certain pitcher, or because of a certain quarterback, or injury situation, or the field, or homefield advantage might be better on a given day. Those games have skill. A man with ordinary intelligence would feel that chance is not always playing a part in this type of game. Without chance being in there a man of ordinary intelligence would have to conclude from the Commercial Gambling Statute that this type of bookmaking is not prohibited.

Does the statute deceive the common mind? Quite obviously these statutes do deceive the common mind. If you go back to the argument on chance, when you bet on games of skill this is not chance. In fact the previous statutes even recognized that. 21 O.S. §941. They mention poker, craps, roulette. They do not define it on terms of chance, they define it on certain games. The Legislature in the Commercial Gambling Statutes depend upon chance being the key definitional term. This term itself is misconstrued. What is chance to one person might be betting on a football game, while that is skill to someone else. Horse racing is is completely prohibited by another statute, but there is an element of skill in it. Further, the definition of a gambling place could deceive the common mind. What is a gambling place? Again, if you do not know what chance is or if you know persons who are known

gamblers, there is no way to know what law is violated. People in the stock market are gamblers. Real estate investments are gamblers. Everything is a gamble.

What is a gambler? A high risk gambler is possibly a high risk financier. How would a person of ordinary intelligence know when the statute is being violated? This question depends again on what a person of common and ordinary intelligence thinks a bet dependent upon chance is. If a person feels that it is dependent upon a football game, then it is being violated. If a person thinks it is dependent upon a roll of the dice, then you must go to a place where they have a dice game before it can be violated. A person or ordinary intelligence may not know when a statute is being violated.

If the Legislature desires to make betting on football, basketball and baseball games illegal, it can certainly pass an act which specifically states that. They do not need to pass an act that is so ambiguous and vague that one cannot determine what is a violation of the same. Our Legislature is filled with wise men and they should draft the statute where a person of ordinary intelligence would know what is prohibited and not have to guess as the situation has developed in the instant case.

The Court's attention should now be directed to the statutory term "gambling device" as defined in Section 981, which states:

> "A gambling device is a contrivance designed primarily for gambling purposes which for a consideration affords the player an opportunity to obtain something of value, the award of which is to be determined by chance."

There is nothing in Section 982 that makes illegal the operation of a gambling device, as defined in Section 981. What is made illegal, is the setting up of the gambling device for the collection of proceeds of the gambling device.

On its face, this section becomes vague, uncertain and constitutionally defective.

With the poor legislative drafting of Section 982-5 and Section 981-3, the owner of the gambling device and the one who profits from the gambling device escape prosecution. The owner escapes all prosecution under this section if he hires a person to set up the gambling device and he hires another person "to collect the proceeds of the gambling device."

Who can be prosecuted under Section 982-5 for setting up for use any gambling device? Could an electrician bring power to a room to be used to supply power to a device be subject to a felony charge? Would a transfer trucking company and its employees become subject to felony charges by setting up a device? Would the driver of an armored car picking up a bag of money from such a place be collecting proceeds of a gambling device?

That these questions can be raised presents a problem of vagueness and uncertainty. But even greater uncertainty arises when the second part of the definition of gambling device is considered. Besides that part previously mentioned, Section 981-3 further defines "gambling device" as:

> "Any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet."

This latter portion of the definition of "gambling device" makes absolutely no sense. It defines something that is not carried forward and made illegal in Section 982. Consider the following:

> a) Section 981-3 defines a gambling device as any token, chip, paper or receipt; however, Section 982 does not make it illegal to possess this type of gambling device.

b) Section 982-5 describes the illegal act as the setting up of any gambling device; however, one does not set up a "token, chip, paper or receipt."

c) Section 982-5 also makes it illegal to collect proceeds of any gambling device. It does not prohibit the possession of the proceeds. One cannot collect proceeds from a gambling device that is defined as "any token, chip, paper or receipt." These things are at the most evidence of one's participation "in a lottery or the making of a bet."

d) Section 982, however, does not make it illegal for one to participate in a lottery. Nor is it illegal for one to make a bet. Section 982-4 makes it illegal to conduct a lottery; there is no mention of participation in a lottery.

From the above analysis of Section 981-3 and Section 982, it is clear that the Oklahoma Legislature left out and omitted the most critical part of the statute. As stated at the start of this statutory analysis, the Oklahoma Legislature forgot to make it illegal for a person to participate in a lottery, cast a bet or make a wager.

This simple omission in Section 982 makes the entire Commercial Gambling Statute vague and unclear. With this omission, it establishes evidence, such as token, chip, paper, receipt, totally immaterial and irrelevant. We are left with evidence of something that has not been made illegal.

The only solution to this poor drafting of the statute is for the Court to rule the Commercial Gambling Statute to be unconstitutionally vague and uncertain. It will then be up to the legislative body to explicity say in clear language what it wants to proscribe.

CONCLUSION

There is no way of avoiding or removing the uncertainty and vagueness of Section 982. It must, therefore, be ruled to be unconstitutionally vague and uncertain. This conclusion becomes even more critical when that section is read in light of Section 987. When faced with the problems presented by the invasion of free speech and the denial of equal protection, the constitutionality of the entire statute is left in serious question.

This Court is therefore urged to rule that the Oklahoma Commercial Gambling Statute, 21 O.S. §981, et seq., is unconstitutionally vague and uncertain.

Respectfully submitted,

(s) *William E. Boswell, Jr.*
WILLIAM E. BOSWELL, JR.
Attorney for Defendant
207 City National Bank Building
Norman, Oklahoma 73069

[Certificate of Mailing omitted in printing]